

REED E. SCHAPER (SBN 082792)
rschaper@hkemploymentlaw.com
HIRSCHFELD KRAEMER LLP
233 Wilshire Boulevard, Suite 600
Santa Monica, CA 90401
Telephone: (310) 255-0705
Facsimile: (310) 255-0986

KRISTIN L. OLIVEIRA (SBN 204384)
koliveira@hkemploymentlaw.com
HIRSCHFELD KRAEMER LLP
505 Montgomery Street, 13th Floor
San Francisco, CA 94111
Telephone: (415) 835-9000
Facsimile: (415) 834-0443

Attorneys for Defendants
ADVENTURES ROLLING CROSS COUNTRY,
INC., dba ADVENTURES CROSS COUNTRY
(ARCC) and SCOTT VON ESCHEN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
SAN FRANCISCO DIVISION

PETER WRIGHT and MICHELLE
TRAME, individually, on behalf of all
others similarly situated, and on behalf of
the general public,

Plaintiffs,

vs.

ADVENTURES ROLLING CROSS
COUNTRY, INC., dba ADVENTURES
CROSS COUNTRY (ARCC), a California
Corporation, SCOTT VON ESCHEN, and
DOES 1 through 50 inclusive,

Defendants.

Case No. 3:12-cv-00982-EMC

**DEFENDANTS' NOTICE OF MOTION AND
MOTION FOR PARTIAL SUMMARY
JUDGMENT; MEMORANDUM OF POINTS
AND AUTHORITIES [FILED WITH
DECLARATION OF SCOTT VON
ESCHEN; REQUEST FOR JUDICIAL
NOTICE]**

Date: April 4, 2013
Time: 1:30 p.m.
Ctmm: 5, 17th Floor
Judge: Hon. Edward M. Chen

NOTICE OF MOTION

TO THE COURT AND ALL PARTIES:

NOTICE IS HEREBY GIVEN that on **Thursday, April 4, 2013 at 1:30 P.M.**, or as soon thereafter as counsel may be heard in the above-entitled United States District Court, located at the Phillip Burton Federal Building & United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, 94102, Defendants Adventures Rolling Cross Country and Scott von Eschen ("Defendants" or "ARCC") will and hereby do move the Court for partial summary judgment pursuant to Federal Rule of Civil Procedure 56.

This motion is made on the grounds that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law as to Plaintiffs' Fourth Cause of Action for Violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 206, 207, 216, because Defendants are an organized camp or recreational establishment and thus exempt from the FLSA under 29 U.S.C. §213(a)(3).¹

Defendants' motion for partial summary judgment is made on the further basis that ARCC is an organized camp under the California Health & Safety Code and is entitled to exemptions afforded an organized camp, as identified in Defendants' First Affirmative Defense.

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¹ The caption of Plaintiffs' Complaint indicates that their sole claim arising under the Fair Labor Standards Act is labeled as their "Eighth" cause of action. However, in the body of Plaintiffs' Complaint, the factual assertions and legal allegations supporting the sole FLSA claim are labeled as the "Fourth Cause of Action – Failure to Pay Overtime and the Minimum Wage In Violation of Federal Law (Fair Labor Standards Act, 29 U.S.C. §§ 206, 207, 216 ("FLSA"))." See Cmpl., ECF Document 1, Filed 2/27/29, pp. 11:26-13:7, ¶¶57-65.

1 This motion is based upon this Notice of Motion and Motion, the below Memorandum of
2 Points and Authorities, the Request for Judicial Notice and the Declaration of Scott von Eschen
3 and attached exhibits filed concurrently herewith, all pleadings and papers on file in this action,
4 and upon such other matters as may be presented to the Court at the time of hearing.

5
6 Dated: February 28, 2013

HIRSCHFELD KRAEMER LLP

7
8 By: /s/ Reed E. Schaper

Reed E. Schaper
Kristin L. Oliveira

9 Attorneys for Defendants
10 ADVENTURES ROLLING CROSS
11 COUNTRY, INC., dba ADVENTURES
12 CROSS COUNTRY (ARCC) and SCOTT
13 VON ESCHEN
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HIRSCHFELD KRAEMER LLP
ATTORNEYS AT LAW
SANTA MONICA

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SANTA MONICA

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This partial motion for summary judgment concerns the application of a specific FLSA minimum wage and overtime exemption to Defendant Adventures Rolling Cross Country, Inc. (“ARCC”), and the definition of an “organized camp” under the California’s Health and Safety Code and Labor Code. ARCC is a trip and travel camp and qualifies as an “organized camp” under the FLSA and California law. Like dozens of other trip and travel camps in the United States, ARCC offers extended seasonal overnight camps in which student campers travel to domestic and international destinations and participate in traditional summer camp activities, like boating, hiking, and camping outdoors. The only difference between ARCC and traditional sleep-away summer camps is that ARCC’s student campers and the camp counselors (called Trip Leaders) do not stay at one campground or location for their entire stay. Rather, as holds true for all trip and travel camps, ARCC’s campers and Trip Leaders participate in multi-week recreational activities, outdoor education, and community service projects across the globe. Trip and travel camps are recognized by the camping industry as summer resident camps for youth, including by the American Camp Association, an organization that accredits trip and travel camps. The American Camp Association advertises ARCC and other trip and travel camps on its website. Like traditional summer organized camps which are unquestionably exempt from minimum wage and overtime laws under the FLSA “Camp Exemption,” ARCC offers its campers lodging, food, and a sustained program of recreational and educational events which are closely supervised by trained leaders.

Plaintiffs Peter Wright and Michelle Trame have filed a class and collective action complaint in which they contend that ARCC and ARCC’s President, Scott von Eschen, have violated California and federal employment wage laws.² The named Plaintiffs in this action are two former Trip Leaders for ARCC who led ARCC’s summer trip and travel camps.³ As

² Plaintiffs have not yet filed a motion seeking to certify the class action.

³ The parties have agreed to file cross motions for summary judgment focusing only on the question of the statutory exemptions to the minimum wage and overtime laws.

demonstrated below, because ARCC is an organized camp, it qualifies for the minimum wage and overtime exemptions applicable to organized camps under the FLSA. Accordingly, ARCC requests that the Court enter partial summary judgment on two issues. First, ARCC asks the court to enter judgment in its favor on Plaintiffs' Fourth Cause of Action for violation of the FLSA⁴ because ARCC is exempt from overtime and minimum wage requirements under the federal exemption for an amusement or recreational establishment or an organized camp. This exemption wholly bars Plaintiffs' claim for a violation of the FLSA in their Fourth Cause of Action.

Second, ARCC requests that this Court enter partial summary judgment as to Defendants' First Affirmative Defense because ARCC is exempt from the applicable minimum wage and overtime laws on the basis that it is an "organized camp" as defined by California Health & Safety Code Section 18897 and for the purposes of potential application of the exemption under California Labor Code Section 1182.4. See Fed. Rules of Civ. Proc. 56(a) and 56(b).

II. STATEMENT OF FACTS

A. An Overview of ARCC's Adventure Trip And Travel Summer Camps.

ARCC is an organization that offers adventure and experience trip and travel camps for teenagers. (Declaration of Scott von Eschen, (hereafter "von Eschen Decl."), filed concurrently herewith, at ¶¶3, 18.) Founded in 1983, ARCC gives teenagers the opportunity to participate in various summer camp activities, including backpacking, camping, whitewater rafting, learning a foreign language abroad, or completing community service projects. (Id. at ¶¶2, 3.)

ARCC, as with any other trip and travel adventure camp, is different from a more traditional camp setting only in that its activities do not occur in one fixed, stationary location. (Id. at ¶¶6.) Rather, from its location in Mill Valley, California where ARCC has been since 1999, it operates approximately 50 domestic and international travel camp programs each year, most often between the months of June and August. (Id. at ¶¶2, 7.) A large majority of ARCC's

⁴ Specifically, ARCC seeks partial summary judgment on Plaintiffs' Fourth Cause of Action which seeks damages for violation of the Fair Labor Standards Act, Section 206 (minimum wage requirements) and Section 207 (overtime requirements for working more than 40 hours a week. In their Fourth Cause of Action, Plaintiffs seek remedies available under Section 216 of the FLSA, which authorizes the recovery of penalties, attorneys' fees, and damages for failure to pay overtime and minimum wages.

trips occur outside the United States – in Asia, Africa, Europe, Australia, and Central and South America. (Id. at ¶10.) ARCC reserves campgrounds at various locations or has longstanding relationships with certain villages in, for example, Fiji or Costa Rica, for its participants to visit, camp, study a foreign language, and participate in community service projects. (Id. at ¶11.) (The foreign portion of ARCC’s operations is not a remaining subject of this action, as the Court has previously held.⁵) For domestic trips, the campers stay in owned campgrounds in California, Hawaii, Colorado, and Utah. (Id. at ¶10.)

ARCC’s adventure trip and travel summer camps last between two and five weeks. (Id. at ¶4.) ARCC offers three different types of trip and travel camps: multisport, service, and language. (Id. at ¶13.) All three types of camps share a focus on outdoor recreational activities and outdoor education. (Id. at ¶13.)

On ARCC’s multisport trip and travel camp, the student campers (and the Trip Leaders who lead these trips) partake in a number of recreational activities. They backpack, kayak, hike, camp, rock climb, and go whitewater rafting. (Id. at ¶14.) Throughout each adventure, Trip Leaders set aside time to teach classes on such topics as marine biology, map and compass techniques, route finding and navigation, first aid, geology, weather, astronomy, and the natural history of the areas visited. (Id. at ¶14.) ARCC actively teaches Leave No Trace, a national education program that promotes responsible travel in wilderness areas. (Id. at ¶14.) Students also learn skills like leadership, teamwork, and group decision-making that are valuable for those entering college. (Id. at ¶14.) On service trips, campers participate in community projects supporting such organizations as Habitat for Humanity, the Glide Foundation, the Golden Gate Conservancy, and the Truckee Donner Land Trust, or comparable projects and organizations in other countries. (Id. at ¶15.) They also engage in recreational activities like kayaking, biking, and hiking, all while returning to campgrounds or community living settings each day. (Id. at ¶¶15, 17.) The language trip and travel camps allow campers to study a foreign language in another country, again while also participating in traditional summer camp activities, such as

⁵ See ECF Document 22, filed 5/3/12, Court’s Order granting in part and denying in part Defendants’ Motion to Dismiss.

sailing and rafting. (Id. at ¶16.) All campers in ARCC's programs sleep outdoors in local campgrounds exclusively on domestic trips. (Id. at ¶17.) Additionally, students on California trips stop at ARCC's Mill Valley facility during their trips. (Id. at ¶17.) International trips include homestays or similar local culture contact for some nights. (Id. at ¶17.)

ARCC's trips are co-ed; generally, there are approximately 12 to 20 teenagers for each trip. (Id. at ¶8.) The students are further grouped by age on specific ARCC trips to maximize the group dynamic. (Id. at ¶8.) Through its highly-structured camps and trip itineraries, ARCC strives to offer the same summer camp bonding experience that a student would enjoy if they went to a sleep-away camp at a remote lake for three weeks, but instead through an adventurous trip and travel experience. (Id. at ¶19.)

B. The Role Of ARCC'S Trip Leaders

Each travel camp is led by either two or three Trip Leaders. (Id. at ¶9.) Trip Leaders must be at least 21 years-old and are generally either college students or graduates who are working at ARCC as a summer job. (Id. at ¶¶9, 18.) The average age of a Trip Leader is 23 or 24 years-old. (Id. at ¶18.) Trip Leaders work on a seasonal basis, leading the trip and travel camps almost exclusively during the summer months. (Id. at ¶18.) A significant number of Trip Leaders return to work for ARCC for more than one summer. (Id. at ¶18.) Each ARCC Trip Leader must have a minimum of 80 hours of training in Emergency Wilderness Medicine and many are Emergency Medical Technicians with over 120 hours of emergency medical training. (Id. at ¶20.) ARCC assists those lacking the requisite emergency wilderness first aid training to obtain it before leading its trips. (Id. at ¶20.)

Trip Leaders spend a combined total of approximately 10-14 days in pre-camp training and preparatory sessions and post-camp debriefing at ARCC. (Id. at ¶21.) ARCC's pre-trip training occurs at ARCC's Mill Valley facility, as well as at Mount Tamalpais State Park and Salt Point State Park. (Id. at ¶22.) In the training sessions, ARCC prepares Trip Leaders to be far more than attendants or adult supervision for simple travel. Instead, it educates the Trip Leaders on group dynamics, how to handle various types of emergencies or problematic behavior that may arise with the campers, teaching opportunities that will arise during each trip, and specific

1 instructions on the avoidance of risky behavior among the campers. (Id. at ¶¶21, 23.) ARCC's
 2 staff reviews trip logistics with the Trip Leaders including the details of how the Trip Leaders and
 3 campers will travel to each destination within the trip camp. (Id. at ¶¶24, 25.) Trip Leaders also
 4 receive training and education about the local culture of their trip's destinations so that the Trip
 5 Leaders can effectively share this information with the students during the trips. (Id. at ¶¶21, 24,
 6 26.) Since a primary activity of the camp experience for the student campers is leadership
 7 development and group dynamics, the staff also conducts classes for Trip Leaders on these topics
 8 to maximize their ability to share this curriculum while on the trip. (Id. at ¶¶21, 24.) Trip
 9 Leaders receive instruction on ARCC's trip budgets and information as to where the hospitals and
 10 other emergency services are located, and the logistics of ARCC and recreational vendor contact
 11 at each location. (Id. at ¶24.) The itineraries also direct the Trip Leaders how often and when to
 12 contact ARCC during the trip. (Id. at ¶24.)

13 As the sample itineraries demonstrate, Trip Leaders are fully engaged in teaching and
 14 recreational activities throughout the trips. (Id. at ¶¶25, 26.) The teaching/learning opportunities
 15 are daily, and these Trip Leaders are applying the training they receive before the programs begin.
 16 (Id. at ¶¶21, 25, 26.) They are far more than chaperones, babysitters, ticket takers, or porters.

17 At the end of the trip, Trip Leaders also attend a post-trip debriefing for two days at
 18 ARCC's Mill Valley location. (Id. at ¶27.) During the debriefing, Trip Leaders discuss the
 19 campers' participation and involvement during the trip. (Id. at ¶27.) Trip Leaders also review the
 20 performance and leadership abilities of their co-Leader(s) in a meeting with ARCC's Regional
 21 Director. (Id.) They inform the Regional Director of any logistical changes that may be
 22 necessary to the trip itinerary based upon their experience. (Id. at ¶27.) Trip Leaders personally
 23 evaluate ARCC's training and offer suggestions. (Id. at ¶27.) ARCC pays its Trip Leaders a
 24 stipend at the end of the trip. (Id. at ¶28.)

25 **C. ARCC Operates As A Summer Camp.**

26 ARCC's employees and the teenagers who enroll each summer have always considered
 27 ARCC a summer camp, and ARCC has consistently presented itself to the community as a
 28 summer camp. (Id. at ¶¶29-37.) ARCC is a member of the American Camp Association (ACA),

1 and is listed under the “Find A Camp” section of the ACA website. (Id. at ¶29.) In its list of
 2 camps to “find” on its website, the ACA offers a specific category for “trip and travel camps”
 3 among other selections as “resident camps” and “day camps.” (Id. at ¶29.) ARCC also partners
 4 with “camp ladies,” or independent consultants working nationwide who help parents locate an
 5 appropriate summer camp for their child. (Id. at ¶35.)

6 To recruit Trip Leaders, ARCC attends college and university job fairs across the country
 7 each spring and presents itself as a summer camp seeking camp counselors. (Id. at ¶36.) ARCC
 8 also participates in regional camp fairs, such as the Summer Opportunities Fair in St. Louis,
 9 Missouri and the New York Family Camp Fair in upstate New York, to advertise and introduce
 10 its camps to prospective campers. (Id. at ¶37.) ARCC is insured by Markel Rhulen Specialty
 11 Insurance through its specific Camp Insurance Division and ARCC’s premiums are based on the
 12 number of “camper” days per season. (Id. at ¶38.) Further, ARCC advertises on numerous camp
 13 websites, including camppage.com, campresource.com, teensummercamp.com, campchannel.com,
 14 and summercamps.com. (Id. at ¶¶30-34.) Lastly, ARCC has always offered its camp programs
 15 for teenagers only; not adults. (Id. at ¶8.)

16 **D. ARCC Operated As An Organized Camp For Less Than Seven Months In**
 17 **Each Calendar Year.**

18 In 2008, 2009, and 2010, ARCC operated as an organized camp for less than three months
 19 each calendar year. (Id. at ¶¶39-44.) In both 2011 and 2012, it began offering a “Gap program”
 20 for high school graduates on a limited basis consisting of a 90-day extended community service
 21 program, now offered in Africa, Asia or Latin America. (Id. at ¶7.) Even considering its fall Gap
 22 programs, ARCC operated as an organized camp for six months or less. (Id. at ¶¶42-43.) During
 23 the off-season, or when trip and travel camps are not in progress, ARCC markets its camps to
 24 teenagers, develops and updates the camp itineraries, travels to new locations to explore the
 25 creation of new domestic and international travel camps, and attends college and university job
 26 fairs to find new Trip Leaders. (Id. at ¶44.)

27 **E. ARCC’s Average Receipts For Calendar Years During The Statutory Time**
 28 **Period.**

ARCC has determined its average receipts for the application of the overtime and

1 minimum wage exemption under the Fair Labor Standards Act. (Id. at ¶45.) The percentage of
 2 average monthly receipts for the smallest six-months of ARCC's revenues as compared to the
 3 largest six-months of its revenues were 6% for calendar year 2008, 7% for 2009, 12% for 2010,
 4 3% for 2011, and 21% for 2012. (Id. at ¶45.)

5 **III. LEGAL ARGUMENT**

6 **A. Partial Summary Judgment Standard**

7 The Court may grant partial summary judgment in the party's favor on each claim or
 8 defense, or the part of each claim or defense, on which summary judgment is sought. FRCP 56(a).
 9 FRCP 56(a) specifically provides for summary judgment on part of each claim or defense. See
 10 *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68 (1st Cir. 1999) (a district court may dispose of a
 11 particular claim or defense by summary judgment when one of the parties is entitled to judgment
 12 as a matter of law on that claim or defense).

13 Defendants here seek partial summary judgment as to one claim – Plaintiffs' Fourth Cause
 14 of Action for violation of Sections 206, 207 and 216 of the FLSA – based on the statutory
 15 exemption available to organized camps found at 29 U.S.C. 213(a)(3). Defendants also seek
 16 summary judgment on their First Affirmative Defense on the basis that they are entitled in wage
 17 and hour exemptions because ARCC is an "organized camp" as defined in Section 18897 of the
 18 California Health & Safety Code.⁶

19 **B. ARCC is Exempt from the Minimum Wage and Overtime Requirements of** 20 **the Fair Labor Standards Act.**

21 Because ARCC meets the amusement, recreational, or organized camp exemption in the
 22 FLSA, there can be no liability to ARCC for violations of this Act as Plaintiffs allege in their
 23 Fourth Cause of Action. (See Cmplt., ECF Document 1, Filed 2/27/29, pp. 11-13, ¶57-65.⁷)
 24 Section 213(a)(3) of the FLSA provides a complete exemption to the minimum wage and

25 ⁶ Defendants' First Affirmative Defense states, "Defendants were at all relevant times exempt from the applicable
 26 minimum wage, overtime, and other wage and hour laws, including without limitation pursuant to the exemptions
 27 afforded to an employer that is an organized camp." See Defendants' Amended Answer, ECF Document 67, Filed
 28 6/21/12, p. 14, ¶93.

⁷ The caption of Plaintiffs' Complaint provides that their FLSA claim is the Eighth Cause of Action. However, in the
 body of their Complaint, the factual assertions and legal allegations supporting Plaintiffs' FLSA claim may be found
 below the "Fourth Cause of Action – Failure to Pay Overtime and the Minimum Wage In Violation of Federal Law."

overtime requirements of the FLSA:

“For any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if:

(A) it does not operate for more than seven months in any calendar year, or

(B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year ...” 29 U.S.C. §213(a)(3).

ARCC is both an “organized camp” and a recreational establishment and meets both Test (A) and Test (B); it therefore falls within the FLSA exemption from minimum wage and overtime requirements.

1. The Purpose Of The FLSA Exemption.

No court, in any published decision, has determined if a trip and travel camp like ARCC cannot meet this exemption, and available legislative history does not offer specific direction. However, ARCC’s operations as a trip and travel camp for teenagers and its employment of young people as camp counselors and trip leaders fit squarely within the legislative rationale for this exemption. The Tenth Circuit has found that the purpose of this FLSA exemption was “to allow recreational facilities to employ young people on a seasonal basis and not have to pay the relatively high minimum wages required by the Fair Labor Standards Act.” *Brennan v. Yellowstone Park Lines*, 478 F.2d 285, 288 (10th Cir. 1973). The “logical purpose” of the exemption, according to the Sixth Circuit, was “to exempt the type of amusement and recreational enterprises listed above, which by their nature, have very sharp peak and slack seasons. These businesses argue that they should not be held to the same wage and hour requirements as permanent year-round operations. Their particular character may require longer hours in a shorter season, their economic status may make higher wages impractical, or they may offer non-monetary rewards. Congress responded to these concerns by enacting the amusement and recreational exemption.” *Brock v. Louvers and Dampers, Inc.*, 817 F.2d 1255, 1258 (6th Cir. 1987).

The stated purpose of this exemption is to allow recreational facilities to employ young

people on a temporary, seasonal basis and offer non-monetary benefits. *Brennan, supra*, 478 F.2d 285, 288-289. ARCC's business plainly meets the purpose of the exemption as explained in *Brennan*. Plaintiffs work on a seasonal basis, primarily during three months in the summer. (von Eschen Decl. at ¶¶39-44.) Plaintiffs are certainly considered "young people." A Trip Leader must be at least 21 years-old, and the average age of ARCC's trip leaders is 23 or 24 years-old. (Id. at ¶9.) The nature of Plaintiffs' work as Trip Leaders necessarily requires longer hours during the summer season. (Id. at ¶17.) Further, the summer trips are only two to five weeks long. (Id. at ¶12.) ARCC does not employ regular Trip Leaders throughout the year, and only hires (or re-hires) Trip Leaders for the summer and Gap programs. (Id. at ¶18.) The Trip Leader position is designed to necessitate longer hours within a short-term assignment. (Id. at ¶18.) Lastly, ARCC offers non-monetary rewards to Trip Leaders inasmuch as they get free travel, free housing and board, extensive outdoor education, and the opportunity to participate in recreational and educational activities, such as safaris and whitewater rafting, in foreign and domestic locations at no cost to them. (Id. at ¶28.) In sum, the nature of ARCC's business and Plaintiffs' work for ARCC falls within the rationale for the exemption.

2. ARCC Is An "Establishment" For The Purposes of The Exemption.

The exemption in Section 213(a)(3) applies to "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or nonprofit educational center." 29 U.S.C. §213(a)(3). The FLSA does not define "establishment." Rather, as the term is defined by the regulations issued by the Secretary of Labor, "establishment" means a distinct physical place of business. 29 C.F.R. §779.303 (2012).

Plaintiffs will likely contend that ARCC is not an establishment because it runs trips all over the world and, therefore, lacks a "distinct physical place of business." In essence, Plaintiffs contend that ARCC is not entitled to the FLSA exemption because it offers trip and travel camps rather than stationary overnight camps in which campers sleep in a bunkhouse for two weeks at a lake or in the mountains. Plaintiffs' argument ignores the purpose of this exemption and instead focuses on form over substance.

Plaintiffs' argument is faulty for two reasons. First, ARCC maintains a distinct physical

1 place of business in Mill Valley, California. ARCC has been operating its trips from its Mill
 2 Valley location since 1999. (von Eschen Decl. ¶2.) Trip Leaders certainly “work” in Mill Valley
 3 for 10-14 days when they undergo pre-camp training and post-camp debriefing. (Id. at ¶¶21-27.)
 4 During the relevant statutory period, Plaintiffs, and other Trip Leaders, began their employment
 5 at Mill Valley during the eight to 12-day pre-camp training, and ended their employment at Mill
 6 Valley when they returned for a two-day debriefing following their completion of their trip and
 7 travel camp. (Id. at ¶¶21-27.) Trip Leaders all leave from Mill Valley to lead various excursions
 8 and participate with the campers in a variety of recreational and educational activities. (Id. at
 9 ¶¶21, 24.) Thus, ARCC has a distinct physical place of business. It is not a transitory or fleeting
 10 operation, but has operated camps for thirty years. (Id. at ¶¶2, 3.)

11 Second, Plaintiffs’ argument erroneously focuses on an unsupported belief that ARCC, to
 12 be an organized camp, must have Plaintiffs work at one single, physical and static site. Plaintiffs
 13 cannot offer any statutory or judicial authority for this principle.

14 No court has had the occasion to consider the application of the recreational and
 15 amusement or organized camp exception to camp counselors or trip and travel camps. Courts,
 16 however, in considering analogous circumstances, have applied the exemption to maintenance
 17 employees working at various businesses on a fairground. *Hamilton v. Tulsa County Public*
 18 *Facilities Authority*, 85 F.3d 494 (10th Cir.1996) is instructive. The employer in *Hamilton* was
 19 TCPFA, a public trust which managed the Tulsa County Fairgrounds. *Id.* at 496. TCPFA’s
 20 primary purpose was to establish, provide, maintain and promote recreational centers, agricultural
 21 and industrial expositions, fairs, trade shows and other recreational facilities and activities. The
 22 employees were maintenance workers for TCPFA and sought unpaid overtime under the FLSA.
 23 TCPFA argued that the Section 213(a)(3) recreational and amusement exemption applied such
 24 that workers were not entitled to overtime pay. *Id.* The employees claimed TCPFA did not meet
 25 the requirement of a single “establishment” under the recreational and amusement exemption
 26 because they worked at various businesses on the fairgrounds and those businesses constituted
 27 separate establishments. *Id.*

28 The Tenth Circuit rejected the employees’ argument. *Id.* at 497. Although there were

various businesses on the fairgrounds, the Court focused on the fact that TCPFA did not own or operate those other businesses. *Id.* at 497-498. TCPFA simply leased the property to other businesses. Therefore, the issue was solely whether TCPFA was an amusement or recreational establishment itself. *Id.* at 498. TCPFA, the Court held, managed the fairgrounds as an establishment under the exemption. And, because TCPFA's primary purpose was to establish, provide, maintain, and promote recreational centers, agricultural and industrial expositions, fairs, trade shows, and other recreational facilities and activities, it was an amusement and recreational establishment within the meaning of Section 213(a)(3) and its employees were exempt from the FLSA. *Id.*

The Court may utilize the same reasoning in this instance. ARCC does not own or operate the campgrounds, remote villages, or other destinations which Plaintiffs and the campers visit. ARCC has maintained a physical establishment – its location in Mill Valley – since 1999. (von Eschen Decl. at ¶2.) It has operated its trip and travel camps from its Mill Valley site for years. Trip Leaders come to ARCC in Mill Valley for comprehensive, pre-trip training that lasts over a week and involves classroom education, instruction on group dynamics and working with teenagers, and a detailed review of the trip's itinerary. After extensive training and preparations with ARCC staff, the Trip Leaders leave ARCC's Mill Valley site to lead the trip and travel camps. Trip Leaders later return to Mill Valley at the conclusion of their trips to debrief ARCC's staff about the student campers and logistics of the trips. (*Id.* at ¶¶21-24, 27.)

3. **The Principal Activities of ARCC Are Recreational and Those Of An Organized Camp.**

The "principal activity" of an employer is a key factor in determining if the FLSA exemption applies. To determine if an employer meets the FLSA exemption, many courts focus on the employer's principal activity. For example, in *Brennan v. Texas City Dike & Marina, Inc.*, 492 F.2d 1114 (5th Cir. 1994), the court found that a marina did not qualify as a recreational or amusement establishment because the marina's principal activity was selling recreational equipment, not providing recreation. *Id.* at 1118. The marina sold products, like marine hardware and convenience items, and performed a variety of boat maintenance activities. *Id.*

1 Because the marina principally provided recreational means and facilities for boat enthusiasts, it
 2 argued that it was a recreational establishment and exempt from overtime and minimum wage
 3 laws. *Id.* The court found that since the marina's activities were multifaceted, its principal
 4 activity should be determinative of the marina's eligibility for an exemption. *Id.*

5 Undoubtedly, ARCC's primary purpose and principal activity is the development and
 6 operation of recreational opportunities and organized camps for teenagers. The legal authorities
 7 instruct the court to focus on the heart and essence of ARCC's business – the operation of
 8 adventure camps – to find that this exemption applies.

9 The Wage and Hour Administrator (WHA) of the Department of Labor found that an
 10 employer running an "adventure" qualified for the recreational and amusement exemption. In a
 11 2006 Opinion Letter, the WHA concluded that employees of a nonprofit educational organization
 12 which provided "wilderness base camps" were exempt from Section 213(a)(3). The employer in
 13 that instance had seven different schools operating 45 "base camps" offering outdoor expeditions
 14 across North America. The WHA did not define or explain what a base camp was, other than to
 15 note the camps were "wilderness" and operated on a seasonal basis. The expeditions included
 16 white-water rafting, dog sledding, skiing and canoeing. The WHA applied a three-step analysis
 17 to determine if the employees were covered by the exemption. The first step was to determine
 18 whether the seven different schools and 45 base camps qualified as separate establishments or
 19 whether the employer was to be considered a single establishment. The WHA looked to the DOL
 20 regulations that define "establishment" as a physical distinct place of business, rather than an
 21 entire business or enterprise which may include separate places of business. 29 C.F.R. §779.23
 22 (2012). It then declared that the employer's separate base camps were physically remote from
 23 one another and, therefore, separate establishments under 29 C.F.R. §779.23.⁸ The WHA also
 24 found that the primary activities were traditional recreational activities such as hiking, rafting, and
 25 skiing, and concluded that the exemption applied. See Wage and Opinion Letter, Sept. 28, 2006,

26 ⁸ The Ninth Circuit has accorded the Department of Labor's opinion letters deference. See *Solis v. Washington*, 656
 27 F.3d 1079, 1085 (9th Cir. 2011) ("The DOL's interpretation of its own regulations generally is accorded controlling
 28 deference 'unless plainly erroneous or inconsistent with the regulation.'") See also *Skidmore v. Swift & Co.*, 323 U.S.
 134, 140 (1944) (DOL's rulings are not binding on the courts, but constitute a body of experience and informed
 judgment to which courts and litigants may properly resort for guidance).

1 FLSA2006-37.

2 Similarly, ARCC operates trip and travel camps at different wilderness or related locations
3 across the world. The DOL regulations do not require that the recreational or camp exemption
4 only apply when there is one physical location. The regulations do not require that the enterprise
5 own a location. In looking at the issue of “establishments,” the courts do not consider if a
6 physical location is fixed or transitory. The wilderness base camp situation is instructive. The
7 anticipated activities – which can include rock climbing, exploring, mountaineering, etc. – are
8 cross country-type activities. They take place away from the base camp. Base camp is a location
9 from which you leave to have experiences away from the base camp, whether or not you return
10 before the end of the camp program. It would make absolutely no sense if the exemption turned
11 on the existence of a location at which the camp employees and campers may spend virtually no
12 time.

13 The same is true as to ARCC. What is, and should be, pertinent in determining if the
14 exemption applies is whether the principal activity of the establishment is recreational in nature.
15 Are the activities those expected of an organized camp? Here, ARCC’s sole design for the last 30
16 years is to offer recreational and educational activities in adventure trip and travel camps. (von
17 Eschen Decl. at ¶¶2, 3, 7.) The activities comprising these adventures are clearly customary
18 summer camp and recreational activities: backpacking, hiking, rafting, surfing, and sailing, as
19 well as service projects and learning a foreign language, to name a few. (Id. at ¶¶12-17.) There
20 are certainly “traditional” camps specializing in all of these activities. If a traditional camp – with
21 cabins and a swimming pool – decided to offer only trip adventures into the wilds around the
22 camp, and as they started their treks, the campers stayed for a single day at the camp’s cabins
23 (now just a base camp), but never returned, the exemption would presumably apply. There is a
24 fixed, physical location and outdoor-centered activities. So too, if ARCC had tents and a fire
25 circle in Mill Valley and campers all left from that location on the California-based trips, the
26 exemption presumably would apply. ARCC in its present form should not be considered any
27 differently.

28 //

1 4. ARCC Is An “Organized Camp” Under The FLSA Exemption.

2 No court has explained what constitutes an “organized camp” under Section 213(a)(3).⁹
 3 However, the Field Operations Handbook (FOH) published by the Department of Labor offers
 4 some guidance. The Handbook states an organized camp [...]

5 “characteristically provides room and board in a rustic setting over
 6 a sustained period of time. An ‘organized camp’ is one with a
 7 program of activities and sustained supervision, provided for a set
 8 fee. The American Camping Association defines a ‘camp’ as a
 9 ‘sustained experience which provides a creative recreational and
 educational opportunity in group living out of doors. It utilizes
 trained leadership and the resources of natural surroundings to
 contribute to each camper’s mental, physical, social, and spiritual
 growth.’” *DOL Field Operations Handbook*, §25j00(b), 4/15/94.

10 Notably, the DOL relied upon the ACA’s¹⁰ definition of a “camp.” And although this
 11 section from the FOH was published in 1994, before the significant growth of the trip and travel
 12 camps in the camping industry, the ACA definition already states that camp is a “sustained
 13 experience,” -- not a sustained **location**. This reference to the ACA is additionally significant
 14 since the ACA identifies specific standards for trip and travel camps, like ARCC. The ACA’s
 15 camp standards¹¹ expressly recognize trip and travel programs as included in the definition of a
 16 “resident camp:”

17 Resident camps: Sessions vary in length. The program is operated
 18 and staffed by the camp, and the supervision of individual campers
 19 is a camp responsibility. Campers stay overnight, and camp is
 20 responsible for campers 24 hours a day. Trip-and-travel camp
 21 programs are resident camp programs, last three nights or more, and
 22 often **do not have a base location**. Trip-and-travel program
 activities are **based upon environments encountered as the group**
moves from location to location. Such programs run as an
 extension of resident or day camp or may be an exclusive trip-and-
 travel camp, specializing in only trip, travel, or tour programs.
 (emphasis added)

23 The ACA has also established specific standards for trip and travel programs. Under the

24 ⁹ In one of the only decisions regarding the “organized camp” criteria of the exemption, *McMillan v. BSA-Aloha*
 25 *Council*, 2012 U.S. Dist. LEXIS 83346 (D. Haw. 2012), the parties agreed that the employer was an “organized
 26 camp.” Thus, the court had no reason to analyze whether the employer, the Boy Scouts, was an organized camp
 under Section 213(a)(3).

27 ¹⁰ The DOL refers to the “American Camping Association.” The American Camping Association, however, changed
 its name in 2004, and is presently called the American Camp Association. Both are referred to herein as the ACA.
 There is no organization called “American Camping Association.”

28 ¹¹ The American Camp Association’s standards are attached to the Declaration of Scott von Eschen as Exhibit J,
 ¶¶46-47.

1 section labeled “Applicability,” the following appears:

2 The trip and travel standards apply to any program conducted or
 3 sponsored by the camp in which the group moves from one site to
 4 another for THREE NIGHTS OR MORE. In backcountry and
 5 wilderness tripping, individuals move under their own power or by
 6 individually guided vehicle or animal (e.g., bicycle, horse, canoe).
 In travel camping, a group uses motorized transportation (e.g., van,
 bus, car, plane) to move from one site to another for experiences in
 different environments. Typically, three types of camps will score
 the trip and travel standards:

- 7 1. Exclusive trip or travel camps, whose singular specialty is
 8 trip or travel camping. Often these programs have no
 9 permanent base site and do not score the site and food
 service standards.
- 10 2. Resident camps who offer trips of three nights or more as
 one of their program options.
- 11 3. Day camps who offer trips of three nights or more as a
 12 special program option, of for experienced or older
 campers. (capitalization in original).

13 Quite simply, if the ACA considers trip and travel camps as resident “camps” in its own
 14 standards, then the Court may find that ARCC is an “organized camp” as defined in the DOL
 15 Field Operations Handbook.

16 ARCC also meets the remainder of the FOH definition of “camp” as it operates camp
 17 programs offering an abundance of recreational and educational opportunities. The students
 18 backpack, hike, kayak, and sail – all traditional summer camp recreational activities. They also
 19 gain an outdoor education, which may include learning how to read a map, how to use a compass,
 20 or how to cook with camping equipment. The student campers cook outdoors and sleep in tents
 21 or underneath the stars. They may camp in a variety of “rustic” settings such as alongside a river,
 22 on a beach, or at a campground. (Id. at ¶¶14, 17.) To that point, the FOH does not describe that
 23 an organized camp must provide the room and board in a rustic setting at one single location.
 24 ARCC’s programs are designed to offer physical, mental and social growth through leadership
 25 activities and traditional camp activities. (Id. at ¶¶13-16.) The student campers are under the
 26 sustained supervision of Trip Leaders extensively trained by ARCC at its Mill Valley location on
 27 leadership activities, emergency preparedness, and group dynamics. (Id. at ¶¶19, 21, 24.) All
 28 components of the definition are satisfied.

5. **ARCC Satisfies Both Test (A) And Test (B) Of The Exemption.**

The Department of Labor has stated that an “organized camp” will be exempt under the FLSA Camp Exemption if it meets Test (A) or Test (B). An organized camp only needs to meet one of these tests to fall within the exemption. Test (A) is that the entity “does not operate more than seven months in any calendar year.” The DOL has stated that whether a camp operates during a particular month requires a determination of whether ARCC “operates” as an organized camp for more than seven months. According to the DOL, if an establishment engages in activities such as maintenance operations or ordering supplies during the “dead season,” then it is not considered to be “operating” for purposes of the FLSA Camp Exemption. See *DOL Field Operations Handbook*, §25j01(b), 4/15/94. See also Wage and Hour Opinion Letter, Jan. 14, 2009, FLSA 2009-5 (finding that organizations that employ lifeguards, beach comfort station attendants and beach maintenance crews, if they meet the seven-month seasonal test, may treat such employees as exempt. An employee does not lose his or her exempt status by working for such an establishment for more than seven months for a year – for example, maintaining equipment – as long as the beach or other establishment is not open as a recreational facility for longer than seven months).

Here, ARCC runs its trip and travel camps from June to August each calendar year. Trip leaders visit ARCC for pre-trip training in June and the various adventure trips are staggered to occur throughout the months of June, July, and August. In the last two calendar years, ARCC has also offered trip and travel “Gap programs” in the fall season. Combined, ARCC does not provide trip and travel camps for more than seven months in a calendar year. (Id. at ¶¶39-43.) During the off-season, ARCC markets its trips to campers, travels to university summer fairs to recruit Trip Leaders, adjusts the itinerary of the trips and travel camps, and tweaks the training sessions for the Trip Leaders. (Id. at ¶44.) ARCC does not, however, operate the trip and travel camps during the off-season. (Id. at ¶44.) Since ARCC operates camping activities for the teenagers for seven or less months, ARCC clearly meets Test (A).

If ARCC satisfies Test (A), then the Court need not consider if ARCC meets the criteria in Test (B). Nonetheless, ARCC clearly meets the requirements of Test (B) as well. The DOL

states that, to determine if Test (B) is met, the monthly average based on total receipts for the six individual months in which receipts were the smallest should be tested against the monthly average for the six individual months when the receipts were largest. ARCC receives approximately 70% of its revenue between February 1 and July 1 each year, when the student campers book their trips. (Id. at ¶45.)

C. ARCC is An Organized Camp Under The California Health & Safety Code Definition.

ARCC's First Affirmative Defense in its Amended Answer is that ARCC is an organized camp and entitled to the exemptions afforded an organized camp. ARCC is entitled to a finding by the Court that it is an organized camp under existing California law. This is a central issue regarding ARCC's defense to Plaintiffs' Third, Fourth, Fifth, Sixth, Seventh and Ninth Causes of Action, all principally related to the contention that ARCC failed to Trip Leaders minimum wage and overtime under state law. If ARCC is an organized camp according to the definition in California's Health and Safety Code, then ARCC may avail itself of California's exemption applicable to organized camps under California Labor Code §1182.4.¹²

For many of the same reasons the FLSA exemption applies, this Court may find as a matter of law that ARCC is an "organized camp," as defined by the California Health and Safety Code. Section 18897 of the Health and Safety Code provides:

(a) "Organized camp" means a site with program and facilities established for the primary purposes of providing an outdoor group living experience with social, spiritual, educational, or recreational objectives, for five days or more during one or more seasons of the year.¹³ (Cal. Health & Safety Code §18897).

Section 18897 was written in 1961, well before ARCC and others like it offered trip and travel camps. The Legislature has not amended Section 18897 with respect to the definition of an

¹² California Labor Code Section 1182.4 (the "California Camp Exemption") provides, in part, that no camp counselor of an organized camp is subject to a minimum wage order if the counselor receives at least 85% of the minimum wage for a 40-hour workweek. An "organized camp" under Labor Code Section 1182.4 means an organized camp, as defined in Section 18997 of the Health and Safety Code, which also meets the standards of the American Camp Association.

¹³ The remainder of Section 18897 is not applicable. Section 18897(b) states an "organized camp" does not include a motel, tourist camp, trailer park, resort, hunting camp, auto court, labor camp, penal or correctional camp and does not include a child care institution or home-finding agency. Section 18897(c) states that an "organized camp" does not include any charitable or recreational organization that complies with the rules of regulations for recreational trailer parks. ARCC clearly does not fall within any of these categories.

1 organized camp since enacting the law over 50 years ago. Nor has any court analyzed the
 2 definition of “site” as used in this statute. In California Labor Code Section 1182.4, however, the
 3 state Legislature has clearly deferred to the standards of the ACA.¹⁴ Accordingly, the ACA’s
 4 position on trip and travel camps is both instructive and legally relevant, and as already noted in
 5 section III.B.4. above, this Court should confidently turn to that ACA guidance.

6 As the ACA points out, trip and travel camps like ARCC do not necessarily have a single
 7 site from which its campers leave and return to each day. ARCC’s trips are outdoor adventures in
 8 the environment, where its campers and the Trip Leaders move from location to location.
 9 Nonetheless, ARCC still maintains a permanent site in Mill Valley from which it operates its
 10 adventure camps and trains its Trip Leaders every year. Indeed, ARCC has maintained this site
 11 for 13 years. It is not only where ARCC’s staff works, it is also a place where ARCC keeps its
 12 outdoor equipment, hosts Trip Leaders who often camp in sleeping bags for a few nights while
 13 awaiting the commencement of pre-trip training or the beginning of their trip, and welcomes
 14 student campers on California trip itineraries.

15 As Section 18897 highlights, ARCC has established programs for the primary goal of
 16 offering an outdoor group living experience with social, educational, and recreational objectives
 17 for its campers. There can be no argument that ARCC’s primary purpose is to operate trip and
 18 travel camps focused on recreational activities, such as hiking, backpacking, kayaking, and
 19 sailing. In addition, the trip and travel camps all offer educational aspects, whether it is
 20 leadership and teamwork exercises, wilderness navigation and map reading in the Rockies,
 21 cultural or language study, or marine biology on the coast of California. Based on the plain
 22 statutory language of the Health & Safety Code, ARCC meets the definition of an “organized
 23 camp.” ARCC is therefore entitled to judgment as a matter of law on its First Affirmative
 24 Defense that it is an organized camp under the California Health & Safety Code.

25 **IV. CONCLUSION**

26 Trip Leaders are supervising and teaching student camper/participants in ARCC’s trip and
 27

28 ¹⁴ California Labor Code §1182.4 states that an organized camp is one which “meets the standards of the American Camping Association.”

1 travel offerings as they are frequently camping outdoors, learning about the physical and cultural
 2 environment, and engaging in all manner of outdoor recreational activities. In short, everyone is
 3 living the camp life for several weeks. Where the leave from on these expeditions is far less
 4 significant as what they are doing. Based on the foregoing, ARCC respectfully requests that this
 5 Court grant the instant Motion for Partial Summary Judgment with respect to Plaintiffs' Fourth
 6 Cause of Action for violation of the FLSA, Sections 206, 207 and 216. ARCC also requests that
 7 the Court find that ARCC is entitled to a finding on its First Affirmative Defense that it is, as a
 8 matter of law, an organized camp under the California Health & Safety Code.

9 If the Court grants partial summary judgment, Defendant ARCC respectfully requests that
 10 the Court specify that its ruling is a final determination of the adjudged issues, which is not
 11 subject to future proceedings in the case.

12
 13 Dated: February 28, 2013

HIRSCHFELD KRAEMER LLP

14
 15 By: /s/ Reed E. Schaper

Reed E. Schaper

Kristin L. Oliveira

Attorneys for Defendants

ADVENTURES ROLLING CROSS

COUNTRY, INC., dba ADVENTURES

CROSS COUNTRY (ARCC) and SCOTT

VON ESCHEN